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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 436

EDWARD TIESI,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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Other Authority Cited

Websters 7th New Collegiate Dictionary, definition, "elicited":

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Counter-Statement of Questions Presented

1. Did the admission into evidence of remarks voluntarily made by defendant during general conversation in an automobile trip and at dinner in a public diner, that he was sorry he had caused certain trouble, violate his constitutional rights?

2. May defendant complain of the admission of testimony concerning incriminating remarks he made to witnesses, where he failed to object to this testimony from the first two out of three witnesses, failed to request the court to charge the jury to disregard the testimony and failed to include their admission as error in his motion to dismiss at the end of the trial or in his motion for new trial after conviction?

3. Should defendant's petition be granted when he has continuously failed to comply with the Rules of this Court relating to Jurisdiction on Writ of *Certiorari*?

Counter-Statement of Facts

Defendant, Edward Tiesi, was indicted for subordination of perjury by the May Term 1962 Grand Jury in Cape May County, New Jersey (D1a). The indictment charged that defendant suborned one Harry Gallagher to falsely testify at a Municipal Court hearing in connection with a motor vehicle violation.

On June 21, 1963, the defendant, Tiesi, was returned from Philadelphia to Cape May County, New Jersey, after an all day extradition hearing. He was transported in a car in which Sgt. John Donnelly of the North Wildwood Police Department, Captain Louis C. Fiocca of the Wildwood Police Department and the suborned witness, Harry Gallagher, were also passengers. Cpt. Fiocca testified that he drove the vehicle containing defendant and the others from City Hall in Philadelphia to the Cape May courthouse (P30a-12 to 34). He described defendant as being very cordial to himself and the others (D11a-20). As they crossed into New Jersey, Cpt. Fiocca asked Tiesi if he was hungry and had he had anything to eat that day. "He said he could eat and I said, 'Do you mind if we stop at a diner and get something to eat?' He said, 'No, I don't mind, I could eat'." (D11a-30). When they arrived at the diner the Captain offered to take off the handcuffs if defendant promised not to run away, and when Tiesi agreed, Sgt. Donnelly removed the handcuffs (D12a-10). As they sat in the diner talking Cpt. Fiocca remarked "Mr. Tiesi, don't you think it was a little foolish of you to attempt to have Harry Gallagher tell these lies in that Court knowing this would happen?" (D12a-12). Whereupon defendant replied, "Well, I'm sorry it happened. I'm sorry for Harry Gallagher." and "I didn't mean to do it. I didn't think it would blow up like this. I am sorry about it" (D12a-15).

Thus, defendant was not "manacled" as described by counsel in his petition for *certiorari*, and the remarks he made which are the subject of this petition, were purely voluntary in the course of discussion during dinner at a public diner. Counsel for defendant made no objection to the line of questioning concerning the statement by defendant during Cpt. Fiocca's testimony, except that the officer was bringing in extraneous matters, (portion of transcript omitted by petitioner). This failure to object was despite the fact that Sgt. Donnelly had testified earlier in the trial to a similar statement by Tiesi (D9a-20), so that counsel knew what was forthcoming. Counsel cross-examined Cpt. Fiocca, but did not direct any questions towards possible coercion of defendant or to any other circumstances that might alter the description by Cpt. Fiocca that the remarks of defendant were made voluntarily during a discussion over dinner in a public diner.

Sgt. Donnelly also testified he had been with defendant for seven or eight hours on that day (D8a-30) and was present with Cpt. Fiocca, Gallagher and defendant, in the car during the ride from Philadelphia (D9a-7). He had a conversation with defendant in the City of Philadelphia, in the car going back to Wildwood and in the diner on the way back (D8a-34 to D9a-5). He stated that Tiesi said he was sorry it happened and he was sorry he got Gallagher fouled up (D9a-32). The only objection raised by counsel to this testimony was that the question was too broad (D9a-10), and that the answer was not responsive (D9a-15), and there was no pertinent cross-examination of Donnelly on the circumstances surrounding defendant's remarks.

Following the testimony of Sgt. Donnelly and Cpt. Fiocca, the suborned witness, Harry Gallagher, testified to hearing a conversation between the two officers and defendant in the car returning to Philadelphia (D13a-10). At this time,

counsel made his initial objection to testimony of defendant's remarks made in the automobile. Counsel specifically stated as his reasons that defendant was manacled, and in a police car (D13a-30), and requested that the testimony of officers Donnelly and Fiocca "with regard to this conversation" (D13a-35) be stricken. However, he made no comment or motion directed to the statements already testified to by Cpt. Fiocca, that were made by defendant when he was not handcuffed and in the public diner. The statements in the diner were essentially identical to the statements made by the defendant in the car. The objection was overruled and Gallagher testified that defendant said he was sorry that he had caused everybody all this trouble (D14a-5).

Defendant submitted twenty-three written requests to the Court to charge the jury (D22a-20 to D27a-10) and later made several supplemental oral requests to charge (D39a-24 to D41a-20). None of these included a request to charge the jury to disregard the testimony of Officers Donnelly and Fiocca or of Gallagher, with respect to the statements made by the defendant during the trip from Philadelphia. The issue was not again raised at trial.

Thereafter, on May 13, 1964, defendant was found guilty by the jury on the charge of subornation of perjury contained in the indictment (D44a-20). A Notice of Motion for New Trial was filed on May 18, 1964 (D45a). The argument now raised by counsel in his petition for *certiorari,* concerning the testimony of Fiocca, Donnelly and Gallagher as to defendant's remarks during the Philadelphia to Cape May trip, was not included as a ground for new trial in this motion (D45a-15 to D46a-12). The motion was denied (D47a), and defendant appealed from the judgment of conviction and sentence thereon to the Superior Court Appellate Division (D49a) which affirmed the convic-

tion *per curiam* (P51a-20). Application was made by the petitioner to the Appellate Division for rehearing on March 16, 1965, (omitted from petition for *certiorari*) and this was denied on March 30, 1965. Defendant petitioned the New Jersey Supreme Court for certification (D51a-25), which was denied on May 12, 1965 (D52a-30).

REASONS FOR DENYING THE WRIT

I

There are no special or important reasons for this Court to grant the petition for a writ of *certiorari*, because the admission into evidence of remarks made by defendant in the automobile and in a public diner during the trip from Philadelphia did not violate any of his constitutional rights.

Initially, it should be noted that the remarks which are now complained of by defendant were not what could be considered in any light a confession nor were they even direct admissions of guilt. At most they were incriminating statements, though susceptible of dual meaning. Cross-examination of any of the witnesses who testified to these remarks could well have neutralized any effect that they had, but this was never attempted by counsel. The defendant himself could have offered an explanation of the remarks, if any adverse inference which they created was not correct, but the record is bare of any testimony by defendant in this direction.

Furthermore, counsel did not object to the admission of these remarks from the first two witnesses who testified to them. *Cf. State* v. *Rhams*, 14 N. J. 282 (1954). When he did raise an objection at the time the third witness, Gallagher, was about to repeat the statements, he based this

on the ground that Tiesi was handcuffed and in a police car at the time he made them. However, Cpt. Fiocca had previously testified to an almost identical statement by defendant made after the handcuffs had been removed and while they were having dinner together in a public diner, so that it is not clear if counsel was actually objecting to all of the statements made by defendant or just some of them. Counsel cannot claim surprise as a reason for not objecting, as two previous witnesses had testified to the same or similar remarks in their direct testimony and he had engaged them in lengthy cross-examination, albeit on other aspects of their testimony, before he raised his first objection.

Even more significant, counsel did not make this part of his motion to dismiss at the end of the State's case (D21a-10), and he made no request to the court to charge the jury to disregard the remarks now complained of (D22a-22). *Cf. State* v. *Auld*, 2 N. J. 426 at 436 (1949). Nor did he raise these statements as a ground for new trial on the motion he made following conviction (D45a). Thus the importance of the remarks complained of, with respect to any prejudice to the defendant or infringement of his constitutional rights, was insignificant even to counsel, and appears to be raised now as an afterthought.

In every case cited by the defendant, and in every case setting forth the principle which defendant argues should be applicable to the instant matter, a direct confession of guilt was involved. In the instant matter the defendant certainly did not confess his guilt to any of the three witnesses who rode with him from Philadelphia. He simply and casually agreed with them that he too was sorry he had caused any trouble to Harry Gallagher. The trouble to which he referred could have been any of several matters between defendant and Gallagher which were referrd to in

various portions of the testimony that has been omitted by defendant in the appendix filed with this Court. Thus, he may have regretted the trouble he caused Gallagher, illustrated by the wage claims made against him by Gallagher, the loss of Gallagher's employment with defendant, or even Gallagher's involvement in a false swearing indictment. The latter circumstance, if this was what defendant was referring to, though arising out of the incident could certainly not be construed to be a confession by Tiesi that he was guilty of subornation of perjury.

Furthermore, the circumstances surrounding defendant's statements do not compare in any respect with the facts of the cases which apply the principles asserted by defendant to be applicable to the instant matter. His was a casual conversation over dinner in a public diner or in the automobile on the trip from Philadelphia. There was absolutely no pressure, coercion or deception. Tiesi had not asked to be allowed to speak to an attorney before engaging in conversation during this trip though he was well versed in all of these procedures and he could just as easily have chosen to be silent and not speak to the other passengers. Certainly Gallagher, who already had been convicted and sentenced, had no advantage to gain by a confession from defendant.

Furthermore, the instant matter does not involve any "involuntary confession" by Tiesi. His statements were not a confession, nor even of the character of oral admissions which have been considered by courts under the cases and principles he asserts. They were simply voluntary, idle remarks made in general conversation. It is to be noted that counsel never requested or suggested any kind of hearing on the voluntariness of the statements in issue, *Jackson* v. *Deimo,* 378 U. S. 368 (1964).

Even if the remarks he made were to be considered as a confession, they certainly, on the facts adduced at trial, were not involuntary within the meaning of the cases. In light of all the circumstances surrounding the making of these remarks by defendant, it cannot be said that they were obtained by surreptitious means when he was unaware he was being interrogated by a police officer, *Massiah* v. *U. S.*, 377 U. S. 201 (1964); that they were extracted by threats of violence, sustained pressure or other circumstances amounting to mental, physical or psychological coercion or unfairness in the due process sense, *State* v. *Smith*, 32 N. J. 501 (1960) *cert. den.* 364 U. S. 936 (1961), *Spano* v. *People of the State of New York*, 360 U. S. 315 (1959); or that they resulted after defendant had requested and been denied the right to consult with counsel, *Escobedo* v. *State of Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964).

We respectfully submit that defendant is endeavoring to exaggerate the effect and meaning of certain remarks made by him in passing conversation, in order to liken them to a confession within the meaning of the cases to which he refers. These remarks were not, however, what could be considered in any light a confession, nor were they even direct admissions of guilt. At most they were incriminating statements admissible in evidence as such, though as noted susceptible of dual meaning.

Counsel relies on cases dealing with the issue of voluntariness of confessions, as well as more recent cases dealing with the right to counsel at the time a confession is made. Had defendant's counsel considered that these incriminating statements were confessions and that there was an issue as to whether or not his client was coerced physically or mentally into making them, then, when they were introduced at trial, his recourse would have been to request a hearing on the issue of voluntariness. *State* v.

La Pierre, 39 N. J. 156, 162-163 (1963); *State* v. *Johnson,* 43 N. J. 572, 586, (1965). This procedure was not new to New Jersey practice at the time of trial in the instant matter as counsel, an experienced practitioner, was well aware, and our procedure conforms to the constitutional requirements of *Jackson* v. *Denno,* 378 U. S. 368 (1964). This was not done, nor was reference ever made by counsel to any question of voluntariness. Furthermore, the record does not reveal that the defendant himself attempted to deny these statements at trial nor that he gave any testimony indicating they were made as a result of physical or mental coercion prior to or during the automobile ride from Philadelphia.

II

The petition for a writ of *certiorari* should be denied because of petitioner's failure to comply with Rules 21-2, 23-1(b)(ii), 23-1(c), 23-1(d), 23-1(e) and 23-1(f), pursuant to Rule 23-4 of this court (28 U. S. C.).

In connection with the present application of petitioner, the only document with which the State of New Jersey has been served is the printed petition for *certiorari.* That document does not conform to the rules of this court. It includes an appendix which purports to contain the record of the trial, but in fact contains only limited partial excerpts. In fact, if a comparison were made between the transcript of the trial and the record included in the appendix, in some instances the purported appendix has only a partial answer to a question or does not contain the question asked. Furthermore, it does not contain the application for rehearing made by defendant to the Appellate Division of the New Jersey Superior Court on March 16, 1965, or the court's denial thereof on March 30, 1965, as

required by Rule 23-1(b)(ii). The petition is otherwise deficient on its face insofar as conformity with the Rules of this Court.

Respondent has never been served with the notice required by Rule 21 (2) indicating the contents of the record that had been filed, pursuant to that rule. This office learned that the petition had been accepted for filing only by telephoning the office of the Clerk of the Supreme Court.

All of these matters may appear to be technical requirements, but in fact have an important bearing in determining whether petitioner has described "* * * with accuracy, . . . and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration . . ." (Rule 23-4). For example the requirement that petitioner make reference to any order respecting rehearing, which petitioner in this case has failed to do, permits this Court to understand not only how many courts have already studied the questions sought to be reviewed, but also how many times each court has had an opportunity to do so.

Furthermore, the State respectfully questions the accuracy of the impression of the case sought to be conveyed to this Court by virtue of the phraseology of the "Question Presented" (Rule 23-1(c)), and certain allegations in the "Statement of Facts." (Rule 23-1(e)). For example, the "Question Presented" states "that an incriminating statement was elicited by police." The word "elicited" infers that the incriminating statement was intentionally drawn from the defendant by the police (page 268, Websters 7th New Collegiate Dictionary), whereas in fact an examination of the record shows that the statement was spontaneously made by the defendant in an informal general conversation being carried on during the course of the ride back

from Philadelphia, and again during the course of dinner in a public diner.

It is represented in the "Question Presented" that the statement of defendant "was admitted over the defendant's counsel's objection." It is also represented that the statement was made while defendant was "handcuffed" and "without the presence of counsel" and that he "was not advised of his right to remain silent." A reading of the question therefore, gives the impression that defendant's counsel objected to the admission into evidence of the statement made by defendant when it was initially offered and that his objection was based on the factors of handcuffing, absence of counsel, and absence of advice of defendant's right to remain silent. In fact, however, the first time this statement was sought to be introduced, the only objection made by counsel was that the question was too broad and that the answer was too responsive. The second time it was offered, through Captain Fiocca, there was a similar objection. It was not until the third consecutive witness made reference to the statement that counsel objected, but at this time he asserted only one of the three reasons now being asserted, handcuffing, and this could apply only to the statement made in the car and not in the public diner where admittedly he was not handcuffed.

Similarly, the "Statement of Facts" contains reference to a motion to strike the testimony. As previously noted, there was never any formal motion made by counsel to strike the testimony in question. The only action in this respect was that at the time the third witness was about to testify, there was an objection to the testimony and an oral motion to strike the testimony given by the two previous witnesses. This was denied at the time. Counsel never renewed this motion during the course, or at the conclu-

sion, of the trial and although he submitted twenty-three written requests to charge at the conclusion of the case, he never requested the court to charge the jury to disregard this testimony. Even following the court's charge, when counsel added several oral supplemental requests to charge, counsel did not include among these a request that the court charge the jury to disregard any reference to the statements made by defendant in the presence of the police officers.

Furthermore, following his conviction, although counsel did move for a new trial alleging six grounds for relief, the admission of the testimony in question was not included among his reasons.

Thus the phrasing of alleged facts contained in the petition does not present to the Court an accurate and clear picture of that which actually occurred.

In addition, Rule 23 (1) (d) requires that the constitutional provisions or regulations which the case involves should be set forth verbatim with citations. An examination of the petition for *certiorari* shows that there is no reference whatsoever by petitioner to the specific constitutional provision he claims has been violated.

Finally, counsel has not indicated where in the course of the proceedings at the trial the Federal questions were first raised, pursuant to Rule 23(1) (f), or that they were properly raised. The confusion as to this point alone, which is created by the partial record contained in the appendix, and the terminology used and references made in the "Questions Presented" and "Statement of Facts," attests to the importance of compliance with the Rules of the Court referred to above.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be denied.

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